COURT OF APPEALS
DECISION
DATED AND FILED

August 9, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2506 **Cir. Ct. No. 2000CF100**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. REMMEL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Pierce County: JOHN A. DAMON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Michael Remmel appeals an order denying his WIS. STAT. § 974.06[1] motions for plea withdrawal and sentence modification. Remmel argues that the circuit court erred by denying his plea withdrawal motion as untimely. Although we agree that the motion was not untimely, we nevertheless affirm that part of the order denying the plea withdrawal motion on other grounds. Because the State concedes that the circuit court erroneously exercised its sentencing discretion by imposing a term of initial confinement longer than the maximum allowed, we reverse that part of the order denying Remmel's motion for sentence modification and remand the matter to the circuit court for resentencing.

BACKGROUND

¶2 In December 2000, the State charged Remmel with operating while intoxicated, tenth offense, contrary to WIS. STAT. § 346.63(1)(a) (1999-2000). Both the complaint and the information stated that the maximum penalty for the crime was imprisonment for not less than six months nor more than five years. Remmel pled guilty to the crime charged and although the court engaged Remmel in a plea colloquy, it is undisputed that the court did not discuss the penalties for the offense with Remmel. After accepting his guilty plea, the court imposed and stayed a five-year sentence consisting of four years' initial confinement and one year of extended supervision, and placed Remmel on five years' probation. Remmel's probation was subsequently revoked.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 Remmel then moved to modify his sentence on grounds that it was excessive and exceeded the maximum allowed under truth-in-sentencing.[2] Remmel also moved to withdraw his plea, claiming it was not knowingly entered because the circuit court failed to inform him of the maximum penalty for his crime. Specifically, Remmel claimed: (1) the circuit court failed to inform him of the sentence's structure when he entered his guilty plea; (2) his trial counsel was ineffective for not informing him of the sentence structure; and (3) the trial court failed to inform him that he would have to spend all of his term of confinement in prison. The circuit court denied Remmel's motion as untimely. This appeal follows.

DISCUSSION

I. Timeliness

¶4 Remmel argues that the circuit court erred by denying his motion for plea withdrawal as untimely. As the State concedes, Remmel's motion was made pursuant to WIS. STAT. § 974.06, which has no time limit.[3] Rather, the only limit

[2] "Truth-in-sentencing" refers to the sentencing revisions enacted in 1998 and applicable to felonies committed on or after December 31, 1999. *See* 1997 Wis. Act 283, § 419, creating WIS. STAT. § 973.01.

[3] WISCONSIN STAT. § 974.06(4) provides:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

on § 974.06 motions is that they may not be used to review issues that were or could have been litigated on direct appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 172, 517 N.W.2d 157 (1994). This bar does not apply to Remmel because he never pursued a direct appeal nor had he previously filed a § 974.06 motion. Therefore, we conclude the court erred by denying Remmel's motion as untimely.

II. Knowledge of Sentence Structure or Maximum Penalty

¶5 Turning to the merits, Remmel contends he should be allowed to withdraw his plea because it was not knowingly entered. We are not persuaded. Waivers of constitutional rights under a plea agreement must not only be voluntary, but must also be knowing, intelligent acts done with sufficient awareness of the relevant circumstances. ***State v. Hampton***, 2004 WI 107, ¶22, 274 Wis. 2d 379, 683 N.W.2d 14. Courts are required to notify defendants of the direct consequences of their pleas. ***Id.*** Among the general duties of the trial court in accepting a plea is the duty to establish the accused's understanding of the nature of the crime charged and the range of punishments it carries. ***Id.***, ¶23; *see also* WIS. STAT. § 971.08.

¶6 When a court fails to comply with the required procedures for accepting a plea, a defendant may seek to withdraw his or her plea. Where, as here, a defendant seeks to withdraw his or her plea after sentencing, the motion should be granted only if it is necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Remmel has the burden of proving by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980).

¶7 To determine whether a defendant's plea was knowingly, intelligently and voluntarily entered, a defendant must first make a prima facie showing that his or her guilty plea was accepted without complying with WIS. STAT. § 971.08 or another court-mandated duty. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). A prima facie showing must also include a defendant's assertion that he or she did not know or understand the information the court failed to provide. ***Id.*** Upon making this prima facie showing, the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily and intelligently entered. ***Id.*** at 274-75. Under these circumstances, the circuit court must hold an evidentiary hearing at which the State and the defendant can offer evidence as to whether the defendant in fact knew the information that should have been provided. ***Hampton***, 274 Wis. 2d 379, ¶46. The State may rely on the entire record in showing the defendant understood the required information. ***Id.***, ¶47.

¶8 Remmel argues he is entitled to withdraw his plea because the circuit court failed to inform him at the plea hearing of the sentence's structure under truth-in-sentencing. Remmel maintains that he believed he could receive four years' initial confinement and one year of extended supervision. Remmel thus claims that by not knowing the correct breakdown of his potential sentence, his plea was unknowing. Although WIS. STAT. § 973.01(8) requires the court to explain determinate sentences at a sentencing hearing, Remmel fails to identify any authority imposing such a requirement upon a court at the plea hearing.

¶9 To the extent Remmel claims the court failed to inform him of the maximum possible penalties for the offense, the State concedes the error. In his plea withdrawal motion, however, Remmel admits that when he pled, he knew five years' imprisonment was the maximum penalty based upon the charging

documents. A defendant is not allowed to withdraw his or her plea unless the record demonstrates that he or she was completely unaware of the maximum penalties. *See* ***Bangert***, 131 Wis. 2d at 274-75. Because Remmel admits he was aware of the maximum penalty when he entered his plea, he is not entitled to plea withdrawal.

III. Ineffective Assistance of Trial Counsel

¶10 Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). In order to prove ineffective assistance, Remmel must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶11 To prove prejudice, Remmel must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). This claim presents a mixed question of fact and law. ***Strickland***, 466 U.S. at 698. The circuit court's factual findings will not be disturbed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's performance was deficient and prejudicial, however, are questions of law that we review independently. ***Id.***

¶12 Here, Remmel argues his trial counsel was ineffective for not informing him of the sentence structure. In his postconviction motion, Remmel argued

> there is a reasonable probability that, but for counsel's unprofessional failure to inform his client about the potential range or amount of time the defendant would serve in prison under the term of confinement portion of the sentence, he would not have pled guilty to the offense and would not have received a term of confinement imposed by the court in excess of that required by law.

¶13 Although Remmel claims he would not have pled guilty but for counsel's performance, this statement is merely conclusory and therefore insufficient to support his claim. *See* ***State v. Allen***, 2004 WI 106, ¶¶9-10, 274 Wis. 2d 568, 682 N.W.2d 433. To the extent Remmel claims counsel was deficient in failing to challenge the imposition of an illegal sentence, Remmel has not been prejudiced by any deficiency as this court is reversing the denial of Remmel's motion for sentence modification and remanding the matter for resentencing. *See infra*, ¶15. Any claimed deficiency on the part of Remmel's trial counsel does not, therefore, establish prejudice sufficient to justify plea withdrawal.

III. Absence of Parole and Good-Time Credit Under Truth-in-Sentencing

¶14 Remmel additionally claims he is entitled to plea withdrawal because the trial court failed to inform him that he would have to spend all of his term of confinement in prison or, stated differently, that he was not eligible for good time or parole. As this court concluded in ***State v. Plank***, 2005 WI App 109, ¶¶12-17, ___ Wis. 2d ___, 699 N.W.2d 235, the lack of parole and good-time eligibility under truth-in-sentencing is a collateral consequence of a guilty plea, and thus, not something that a defendant had to understand before entering such a

plea. Because the trial court was not required to inform Remmel that under truth-in-sentencing he was ineligible for parole or good-time credit, the absence of this knowledge did not render Remmel's plea unknowing.

IV. Motion for Sentence Modification

¶15 Finally, Remmel argues his sentence should be modified on grounds that it was excessive and exceeded the maximum allowed under truth-in-sentencing. We agree. Because Remmel's crime was an unclassified felony at the time he committed it, *see* WIS. STAT. § 973.01(2)(b)6 (1999-2000), the court was permitted to impose a maximum initial confinement term of 75% of the five-year sentence, or 3.75 years. Here, the court imposed four years' initial confinement and one year of extended supervision. We will therefore reverse that part of the order denying Remmel's motion for sentence modification and remand the matter to circuit court for resentencing. *See* ***State v. Volk***, 2000 WI App 274, ¶48, 258 Wis. 2d 584, 654 N.W.2d 24.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.